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November 29, 2007

BY CM/ECF

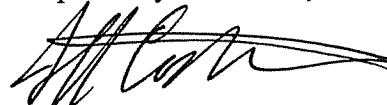
The Honorable Mary Pat Thyng
United States District Court
844 North King Street
Wilmington, DE 19801

Re: Roquette Freres v. SPI Pharma, Inc., et al., C.A. No. 06-540-***

Dear Judge Thyng:

Pursuant to the Court's instruction, enclosed with this letter please find the section of the transcript of the November 14, 2007 deposition of Michel Serpelloni containing the Court's ruling on counsel for plaintiff's instructions to the witness not to answer certain questions.

Respectfully submitted,



Jeffrey T. Castellano (#4837)

JTC:mcm
Enclosure

cc: Clerk, U.S. District Court (By CM/ECF and Hand Delivery)
Mary B. Graham, Esquire (By CM/ECF and Hand Delivery)
Julia Heaney, Esquire (By CM/ECF and Hand Delivery)
Douglas V. Rigler, Esquire (By E-mail)

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MICHEL SERPELLONI

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UNITED STATES DISTRICT COURT

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FOR THE DISTRICT OF DELAWARE

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ROQUETTE FRERES, :

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Plaintiff, : Civil Action Number

8

vs. : 06-540 (***)

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SPI PHARMA, INC., et al., :

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Defendants. :

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CONFIDENTIAL VIDEOTAPED DEPOSITION

15

OF MICHEL SERPELLONI

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Washington, D.C.

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Wednesday, November 14, 200

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REPORTED BY:

25

JULIE T. RICHER

REDACTED

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<p>1 MICHEL SERPELLONI</p> <p>2 VIDEOGRAPHER: We're off the record. The</p> <p>3 time is approximately 4:54 p.m.</p> <p>4 (Recess was taken. Then a conference call</p> <p>5 with Mr. Shaw and Ms. Heaney was placed to the</p> <p>6 Court.)</p> <p>7 THE COURT: Good afternoon. This is Judge</p> <p>8 Thyng.</p> <p>9 MR. SHAW: Good afternoon, Your Honor.</p> <p>10 It's John Shaw at Young Conway. I have everyone,</p> <p>11 the named players in the Roquette v. SPI case.</p> <p>12 THE COURT: Okay.</p> <p>13 MR. SHAW: We're at a deposition.</p> <p>14 THE COURT: Okay.</p> <p>15 MR. SHAW: We're at a break, but the court</p> <p>16 reporter, I guess, is still transcribing, and</p> <p>17 there's been a dispute in the inventor testimony and</p> <p>18 instructions not to answer. So we thank you for</p> <p>19 coming on line, and at this point I'll turn it over</p> <p>20 to the people at the deposition.</p> <p>21 THE COURT: John, thank you.</p> <p>22 MR. MURPHY: Your Honor, this is Daniel</p> <p>23 Murphy from Morgan, Lewis on behalf of SPI Pharma.</p> <p>24 I'm conducting the deposition of the lead inventor</p> <p>25 on the patent in suit, and I was proceeding with</p> <p>TSG Reporting - Worldwide 877-702-9580</p>	<p>1 MICHEL SERPELLONI</p> <p>2 questions regarding certain factual</p> <p>3 characterizations and data contained in the patent</p> <p>4 in suit. And on instruction of the witness's</p> <p>5 counsel, Mr. Rigler, the witness is refusing to</p> <p>6 answer my questions, and the objection is that I'm</p> <p>7 seeking expert testimony.</p> <p>8 I asked a number of questions in that</p> <p>9 vein, received the same objection. Counsel made the</p> <p>10 same instruction to the witness, and I postponed the</p> <p>11 deposition to seek Your Honor's ruling on these</p> <p>12 questions so that we may proceed with the important</p> <p>13 deposition we're conducting here of the inventor of</p> <p>14 the patent in suit.</p> <p>15 THE COURT: Could you read off some of</p> <p>16 the -- or have read off some of the questions that</p> <p>17 you're asking to which an objection was raised,</p> <p>18 please.</p> <p>19 MR. MURPHY: Yes, Your Honor. Your Honor,</p> <p>20 here's a question, and I'll read the objection, my</p> <p>21 response, and the instruction.</p> <p>22 MR. RIGLER: Your Honor, it's Douglas</p> <p>23 Rigler. I can read you the -- I think he asked</p> <p>24 about 50 questions. I objected to about six.</p> <p>25 THE COURT: I understand, Mr. Rigler, that</p> <p>TSG Reporting - Worldwide 877-702-9580</p>

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 2 there may be a debate over a limited amount of
 3 questions.
 4 MR. RIGLER: Right. But I have them here
 5 if it speeds things up.
 6 THE COURT: I wouldn't -- it might be
 7 helpful -- I don't know, Mr. Rigler -- to have this
 8 taken down by a court reporter.
 9 MR. MURPHY: It is, Your Honor.
 10 MR. SHAW: Your Honor, I also -- John
 11 Shaw. I also have them in an email if you wanted to
 12 see some of them. But you may not want to. I'm
 13 sorry to offer that if you don't.
 14 THE COURT: No, no. Why don't you send
 15 them to me.
 16 MR. SHAW: I'll try to do that.
 17 MR. MURPHY: I can read one example of a
 18 question, Your Honor.
 19 "QUESTION: Look at Column 2 of the
 20 patent, starting at line 2 through line 5, beginning
 21 with the word "Unfortunately." Do you agree with
 22 that statement as it's set forth here in the patent?
 23 "MR. RIGLER: Objection, and I'm going to
 24 instruct him not to answer pursuant to our standing
 25 objection. He's not here in an expert capacity, and
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 2 that's a contention question seeking expert
 3 opinion."
 4 Another question regarding a table of data
 5 in the patent:
 6 "QUESTION: Is the listed range for
 7 standard mannitol's friability within the claimed
 8 range for friability in Claim 1 of the patent?
 9 "MR. RIGLER: Again I object. You're
 10 seeking opinion testimony, and it's also a form of a
 11 contention inquiry, and I instruct you not to
 12 answer."
 13 I can read my response and the colloquy if
 14 Your Honor --
 15 THE COURT: I just want to know -- get a
 16 flavor of some of the questions in general.
 17 MR. MURPHY:
 18 "QUESTION: Looking under the same column
 19 which is data in the patent, standard mannitol, do
 20 you see an apparent density measurement for standard
 21 mannitol?
 22 "Yes." That was the answer.
 23 "Does any part of the range of apparent
 24 density for standard mannitol overlap with the
 25 apparent density for the product prepared in
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 2 accordance with the invention?
 3 "MR. RIGLER: Same objection, same
 4 instruction.
 5 "MR. MURPHY: Are you following your
 6 counsel's instruction not to answer the witness?
 7 "Certainly.
 8 "Could you answer if not so instructed by
 9 counsel?
 10 "ANSWER: Yes."
 11 THE COURT: All right. I think that gives
 12 me an idea. Thank you very much.
 13 Mr. Rigler?
 14 MR. RIGLER: Yes.
 15 THE COURT: Do you wish to argue that
 16 statement?
 17 MR. RIGLER: Yes, please, Your Honor. As
 18 I indicated, they have asked a number of questions.
 19 The times I objected were when they asked a witness
 20 who is a lay witness, nonexpert, whether or not he
 21 agreed with statements in the patent.
 22 THE COURT: He was an inventor, correct?
 23 MR. RIGLER: He was an inventor, but he
 24 did not draft the patent application. He did see it
 25 after -- this is from his testimony. He did see it
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 2 after he was -- after the application was granted.
 3 He is not responsible for the language of the
 4 claims. And this would, it seems to me, be asking
 5 him to A, construe claims, and B, it seeks his
 6 opinion. And his opinion as to what the patent
 7 means has no relevance or bearing. That's going to
 8 come out. That depends upon what the patent itself
 9 says, and any interpretation should come from an
 10 expert.
 11 I believe that that is thoroughly
 12 consistent with the prior precedents of the Court.
 13 We did file prior objections to answering this type
 14 of questions, I think about a week ago. There was
 15 no response to our objections, and we did consult
 16 with local counsel. And I'm informed that there are
 17 a series of decisions by the Court that support our
 18 position.
 19 Julie, if --
 20 There's language in an opinion by Judge
 21 Stapleton which I think is quite consistent with the
 22 objection I've raised.
 23 THE COURT: Well, I'm going to cut this
 24 short, and I know that Judge Stapleton has certain
 25 opinions, and I have other opinions. I have a
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 2 standard order that I have issued in the past where
 3 I basically take the position that when it comes to
 4 deposition testimony -- and I recognize your
 5 argument, Mr. Rigler, about it being opinion, and
 6 certainly that can be brought out, and you can sit
 7 there and say that you don't agree or that you don't
 8 think -- you think this is a question of opinion
 9 testimony and make a statement on the record.
 10 However, discovery is intended to try to
 11 obtain relevant information, and I do consider such
 12 information relevant, even though he was not the
 13 actual quote-unquote drafter of the patent. My
 14 standing order and an order, quite frankly, that I
 15 got from Judge McKelvie is as follows.
 16 From the commencement until the conclusion
 17 of a deposition, no party or his attorney shall
 18 instruct the deponent not to answer a question or
 19 directly or indirectly suggest in any way to a
 20 deponent that a question not be answered, subject
 21 only to the exception that a party or his attorney
 22 may instruct his witnesses not to give answers which
 23 would disclose the work product of said party's
 24 attorneys, including trial preparation materials or
 25 the content of privileged communications between a

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 2 party and his attorney.
 3 And that is kind of the approach that I
 4 take on a number of depositions, including in patent
 5 cases. It's kind of sum and substance. If there's
 6 going to be objections raised but you preserve them
 7 for the record, I allow such objections to questions
 8 which shall only include concise and
 9 non-argumentative statements on the grounds of such
 10 objection.
 11 Which so far, Mr. Rigler, I believe that's
 12 what you've done.
 13 You can give, for example, a reference to
 14 a court rule or a federal rule of evidence, and no
 15 instructions necessarily are given to the witness,
 16 except as I outlined to the extent that there's some
 17 concern about work product or certain type of
 18 privileges. I do think that discovery is discovery.
 19 We can weed out whether or not it's admissible,
 20 usable, or matters that go -- matters that a party
 21 can't end up using because it's basically
 22 inconsistent with a particular finding of this Court
 23 or, more importantly, inconsistent with the
 24 application of the law. But I do believe that
 25 discovery is discovery.

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 2 Now, the fact that I've made this ruling
 3 does not only apply to Mr. Rigler. It applies
 4 throughout this case for any witness. Understand,
 5 Counsel?
 6 MR. MURPHY: Yes, Your Honor.
 7 THE COURT: Was this taken down by a court
 8 reporter, I hope? And I hope the court reporter was
 9 able to hear it.
 10 MR. MURPHY: Yes. She indicates she was
 11 able to hear you.
 12 THE COURT: I would like a copy of what
 13 this colloquy that we had was so that I have it for
 14 this case, please.
 15 MR. MURPHY: Yes, Your Honor.
 16 MS. HEANEY: Your Honor, this is Julie
 17 Heaney. As far as providing guidance in terms of
 18 the questions and whether they are speaking
 19 contentions via deposition testimony, are you able
 20 to do that?
 21 THE COURT: Well, I think that that wasn't
 22 really clear. It is to -- and, you know, I think
 23 there's a really fine line there, Julie. I
 24 understand that it's supposed to be generally in
 25 interrogatory form and that contention

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 2 interrogatories are generally not allowed during a
 3 deposition. I don't think that was necessarily what
 4 I was hearing.
 5 You can take -- when it's your witness,
 6 you can take a broad view. When you're trying to
 7 take the deposition of someone else, I'm certain a
 8 very narrow view is applied. But I don't think that
 9 those -- I don't think the questions that I heard
 10 were suggestive necessarily of contention
 11 interrogatories or contention points. And I think
 12 it's extremely difficult to necessarily divide them
 13 out completely. I do believe that there are
 14 questions that fall into that category, but I also
 15 think that counsel relatively understands what I've
 16 said and understands what contention questions
 17 actually are. This witness, from what I understand,
 18 is not being taken under Rule 30(b)(6); is that
 19 correct?
 20 MR. MURPHY: That's correct, Your Honor.
 21 MR. RIGLER: That's partially correct.
 22 The witness was noticed individually but also was
 23 designated under Rule 30(b)(6).
 24 THE COURT: Was he designated by you,
 25 Mr. Rigler?

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2 MR RIGLER: Yes.

3 THE COURT: Okay. Was he designated for
4 all subject matter that was contained in the notice
5 of deposition?

6 MR. RIGLER: No. It was an extensive
7 notice, and we designated different individuals
8 depending on the topic.

9 THE COURT: Okay. And the topic that's
10 being discussed now is not something that he is
11 necessarily a Rule 30(b)(6) witness for?

12 MR. MURPHY: Yes, Your Honor. That's
13 correct.

14 THE COURT: I'm not saying there's
15 necessarily a difference. I just wanted to make
16 certain of that. So his answers are on an
17 individual basis and do not necessarily bind the
18 plaintiff, correct, as a Rule 30(b)(6) witness?

19 MR. MURPHY: That's my understanding, Your
20 Honor.

21 THE COURT: And so I don't feel what I
22 heard was contention interrogatory or contention
23 type questions. Otherwise, I think almost every
24 question that would be asked would probably fall
25 into that category, just about, beyond the person's

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2 name and their background. I think, Counsel, that
3 you're probably aware of what's appropriate.

4 MS. HEANEY: Thank you, Your Honor.

5 THE COURT: Bye-bye now.

6 MR. SHAW: Thank you, Your Honor.

7 MR. MURPHY: Thank you, Your Honor.

8 (The telephone call ended.)

9 VIDEOGRAPHER: We're back on the record.

10 The time is approximately 6:01 p.m.

REDACTED

REDACTED